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09/641,410	08/18/2000	Alice Mary O'Donnell-Kiely		7256

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EXAMINER

CHAWLA, JYOTI

ART UNIT	PAPER NUMBER
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1794

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 09/641,410	Applicant(s) O'DONNELL-KIELY, ALICE MARY	
	Examiner JYOTI CHAWLA	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 28 January 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 319-344 is/are pending in the application.
- 4a) Of the above claim(s) 345-348 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 319-348 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>1/28/2008</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Note: To expedite prosecution applicant is requested to furnish support for the subject matter recited in the new and amended claims in the current application. Furthermore, the applicant is requested to recite the claims such that the rejections made under 35 USC 112 in the previous office actions are corrected.

Election/Restrictions

Newly submitted claims 345-348 are directed to a method of making a support, i.e., an invention that is independent or distinct from the invention elected in response filed January 18, 2003 to the original restriction requirement.

Since applicant had elected frozen supported comestible having a composite support and not the method of making the comestible, therefore, claims 345-348 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03. Thus claims 345-348 will not be examined in the present office action.

Thus claims 319-344 will be examined in the present application.

Claim Rejections - 35 USC § 112 (First paragraph)

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 343 and 344 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. In the instant case claim 343 recites "A support for a frozen comestible comprising two edible ingredient materials and means for making a support for a frozen

comestible". Claim 343 as recited in non enabled as there is no disclosure either in the claim or in the specification about what means or apparatus or equipment is employed to make a support for a frozen confection as recited. Thus one of skill would not be able to make and use the invention without disclosure of the specific means of making or manufacturing a support.

Claim Rejections - 35 USC § 112 (Second paragraph)

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 319-344 are rejected under 35 U.S.C. 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 319-327 are unclear for the recitation of "wherein said two edible ingredient materials comprises an ingredient in a support" as it is unclear as to what is encompassed by the term "ingredient" as it is used in claim 320. It is unclear as to how the term ingredient is different from "two ingredient materials" as recited in claims 319-326. Further, it is unclear how the term "ingredient materials" as recited in claims 319-326, are different from "combined ingredient materials" as recited in claim 327. It is also unclear as to how the "ingredient" of claim 320 differs from claim "ingredient material" of claims 319 and 324 or from "combined ingredient material" of claim 327. Thus the claims as recited are unclear for the purposes of prior art comparison. Clarification and/or correction is required.

Claim 320 is also indefinite for the recitation of "a support" in line 2 of the claim as it is unclear whether the limitations of claim are essential part of the invention or merely

describe an edible support in general. Similarly other claims, for example, claims 324 and 339 also recite the same term "a support". Correction is required.

Claim 321 is rejected for being indefinite as it is unclear as to what added limitation is being recited in claim 321. Claim 321 depends from claim 320 which in turn depends from claim 319. Claim 321 restates the limitations of independent claim 319, which are already part of claim 320. Thus, either claim 321 does not further limit claim 320 or applicant has chosen to redefine a known term. Where applicant acts as his or her own lexicographer to specifically define a term of a claim contrary to its ordinary meaning, the written description must clearly redefine the claim term and set forth the uncommon definition so as to put one reasonably skilled in the art on notice that the applicant intended to so redefine that claim term. *Process Control Corp. v. HydReclaim Corp.*, 190 F.3d 1350, 1357, 52 USPQ2d 1029, 1033 (Fed. Cir. 1999).

Claim 324 is also indefinite for the recitation of "wherein said two ingredient materials comprise a support" as it is unclear whether the limitations of claim 324 are included in the invention or just a generic recitation of the conventionality of two ingredient materials, such as, sugar and water or flour or fat, present in any edible support for a frozen comestible. Clarification and/or correction is required.

Claim 327 is unclear for the recitation of "two combined ingredient materials" as it is unclear as to what is encompassed by said term. It is unclear whether the term "two combined ingredient materials" refers to two separate ingredients (such as, sugar and water) or the term refers to two combined ingredient materials (such as cereal and chocolate). Clarification and/or correction is required.

Claims 328 and 336 are indefinite for the recitation of composite material. Applicant has not distinguished between the terms in the specification and thus the claim as recited is unclear as to what is the scope of the term composite material. It is unclear whether the

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claim requires materials that can form a composite or materials that are composites themselves or some other.

Claim 340, as recited is indefinite for the recitation of "edible composite material comprises two combined ingredient materials...each.. comprises " as it is unclear whether the edible composite material comprises two of the combined ingredients listed or if the two combined ingredients in the composite are composites themselves comprised of the listed ingredients. Clarification and/or correction is required.

Claims 319-344 once again contain the transitional phrases "a composite material, " two edible ingredient materials", "two combined ingredient materials" "two combined edible ingredient materials" "composite material comprises two combined ingredient materials, wherein each of said two combined ingredient materials comprises a candy...graham, filling, gelatin, fruit" which makes the claimed subject matter unclear and thus it renders the claims indefinite. It is unclear as to what is encompassed by said terms. Do the terms include an ingredient that goes in to make a composite such as flakes or raisins or sugar etc., or does the term include composite pieces as an ingredient in making the edible support, such as, chocolate chip cookies or frosted flakes etc. The term "composite" recited is indefinite as it is unclear as to what the term composite refers to because even if a small part of edible support comprises a composite, then the entire support would be considered as a composite support and not just a part of the support would be designated as being a composite material or two ingredient material or two combined ingredient material. It is further unclear as to what relationship do terms like "a composite material", " two edible ingredient materials", "two combined ingredient materials" "composite ingredient comprising two combined edible ingredient materials" have to each other. Clarification and consistent use of the same terminology is requested. Correction is required to expedite the prosecution.

Claim 343 and 344 are indefinite for the recitation of "A support for a frozen comestible comprisingand means for making a support for a frozen comestible". The claim as

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recited is unclear as to what means of making an edible support are being claimed.

Does the term "means" refer to an apparatus or equipment or industrial setup or some other way of making an edible support for a frozen comestible. Correction is required. In order to expedite the prosecution claims 248 and 264 will be regarded as product claims and not apparatus claims and will be rejected as such.

Double Patenting

Statutory Provisional Double Patenting

A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

Claims 319-325 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 225-231 of copending Application No.10/163,209. Also Claims 327-330 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 233-235 and 237 of copending Application No.10/163,209. Further, claim 338 and 342-344 is provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 238 and 247-249 of copending Application No.10/163,209. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

Claims 319-325 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 61-67 of copending Application No.10/167,812. Also Claims 327-330 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention

as that of claims 69-71 and 73 of copending Application No.10/167,812. Further, claim 338-339 and 342 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 74-75 and 78 of copending Application No.10/167,812. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

Nonstatutory Provisional Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

(a) Claims of the current application are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims of copending Application No. 10/163,209. Claims of current application and the corresponding claims of application 10/163,209 have been listed below

09/641,410 claim Number	10/163, 209 claim Number
326	232
339	239, 241 and 242
340	244
341	245

Although the conflicting claims are not identical, they are not patentably distinct from each other because claims 326, 339-341 of the present invention are drawn to an edible support for a frozen comestible with ingredient materials, as is the case with claims 232, 239, 241-242, 244-245 of Application 10/163,209.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

(b) Claims 326, 332, 340 of the current application are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 68, 69 and 76 respectively, of copending Application No. 10/167,812. Although the conflicting claims are not identical, they are not patentably distinct from each other because claims 326, 332 and 340 of the present invention are drawn to an edible support for a frozen comestible with composite ingredient materials, as is the case with claims 68, 69 and 76 of Application 10/167,812.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

1) Claims 319-344 are rejected under 35 U.S.C. 35 U.S.C. 102(b) as being anticipated by Feybusch (US 1638480).

Feybusch teaches edible cones for the support of frozen confections such as ice creams or sundaes, i.e., edible support. The support or cone taught by Feybusch comprises of two ingredient materials, i.e., cone making pastry material (such as sugar, flour etc) and edible adhesive material, such as, molasses (Page 1, lines 55-63), and popcorn or nuts or brittle or puffed rice (Page 1, lines 20-30) as recited in claim 319.

The ingredients sugar, water and flour etc., that are typical ingredients of the pastry cone (i.e., support for a frozen comestible) as taught by Feybusch comprise an ingredient in the support as recited in claim 320.

Regarding claim 321, Feybusch teaches of molasses, popcorn, pastry cone, nuts and puffed rice comprise at least two edible ingredient materials in the support as instantly claimed.

Regarding claim 322, molasses is a homogenous material and is part of the support as taught by Feybusch.

Regarding claim 323, Feybusch teaches of edible support for a frozen comestible further comprising a non-edible material carton which is associated with the edible support as shown in Figures 3 and 4 and also described on page 1, lines 25-30. The

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carton as taught by Feybusch is made of thin cardboard, i.e., paper. Thus the reference teaches of the instantly claimed limitation of the invention.

Regarding claim 324, two ingredient materials, i.e., the pastry cone or cone coated with molasses and further coated with popcorn or nuts or puffed rice or nut brittle comprises a support for the frozen comestible, such as, ice cream, sorbet etc.

Regarding claim 325, the finished cone as taught by Feybusch can be held in hand, which is a handle (handle: a part of a thing made specifically to be grasped or held by the hand). Thus the cone as taught by Feybusch comprises a handle as instantly claimed.

Regarding claim 326, Feybusch teaches of an edible pastry cone with molasses coating, (i.e., an edible binder and a moisture resistant barrier). The molasses covered cone is further rolled in popped corn, or puffed rice, (i.e., edible coating) or peanuts (i.e., nut) or nut brittle (i.e., candy or confection) (See Page 1), as instantly claimed.

Regarding claim 327, Feybusch teaches of pastry cone and nut brittle or popcorn with molasses, each of these have two combined ingredients as instantly claimed (Feybusch Figures 1 and 2 and page 1).

Regarding claim 328, Feybusch teaches of pastry material for the cone (a composite material). Feybusch also teaches of molasses, popped corn, puffed rice or nuts or nut brittle which can be added to make a composite and thus are composite materials as instantly claimed.

Regarding claim 329, Feybusch teaches plurality of ingredients, such as, molasses which is an edible binder and/or moisture barrier. The edible support also comprises of puffed or crisped rice, popped corn (cereal), or peanuts (nuts) or nut brittle (composite bits) (page 1), as instantly claimed. Feybusch also teaches of coating the pastry cone

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with molasses (Page 1, lines 57-65). Feybusch also teaches that molasses forms a practically waterproof intermediate envelope, i.e., molasses forms a moisture resistant barrier (Page 1, lines 75-80), as instantly claimed.

Regarding claim 330, Feybusch teaches of support for a frozen comestible, such as, ice cream. The details of Figure 3 show a picture of ice cream on top of the cone. Feybusch also teaches that the ice confection is highly palatable in the edible support containing with molasses with popcorn or peanuts or rice (Page 1, lines 85-95).

Regarding claim 331, Feybusch teaches a support for frozen comestible, where the edible support also comprises of molasses forming a intermediate envelope with outer coating of puffed or crisped rice, popped corn (cereal), or peanuts (nuts) or nut brittle (composite bits) (page 1). The molasses and the puffed grains on the outside of the edible support will support the grip of the person holding the edible support and also absorb liquefied frozen confection, thus acting as mess or drip guard, as instantly claimed.

Regarding claim 332, the edible support as taught by Feybusch comprises of distinct components, such as, pastry cone ingredients (combined edible ingredient materials), molasses, popcorn, peanuts or puffed rice or nut brittle (combined edible ingredient materials) and thus the frozen confection support as taught by Feybusch comprises of two combined edible ingredient materials, as recited in claim 332.

Regarding claim 333, Feybusch teaches that the two combined edible ingredient materials comprise a support for the frozen confection that also acts as a handle, as recited in claim 333.

Regarding claim 334, Feybusch teaches of a pastry support wherein each of the combined edible materials in the edible support includes molasses coating, (i.e., an edible binder and a moisture resistant barrier). The molasses covered cone is further rolled in popped corn, or puffed rice, (i.e., edible coating) or peanuts (i.e., nut) or nut

brittle (i.e., candy or confection) (See Page 1). Thus Feybusch teaches of the ingredient materials from the list, as instantly claimed.

Regarding claim 335, Feybusch teaches of edible support for frozen comestible comprising plurality of ingredients, such as, molasses which is an edible binder and/or moisture barrier. The edible support also comprises of puffed or crisped rice, popped corn (cereal), or peanuts (nuts) or nut brittle (composite bits) (page 1), as instantly claimed. Feybusch also teaches of coating the pastry cone with molasses (Page 1, lines 57-65). Feybusch also teaches that molasses forms a practically waterproof intermediate envelope, i.e., molasses forms a moisture resistant barrier (Page 1, lines 75-80), as instantly claimed.

Regarding claim 336, Feybusch teaches of an edible support for frozen comestible, which is a composite of various individual materials, as discussed above regarding claims 332-335. Thus the edible support as taught by Feybusch teaches of a composite material, which is the confection cone base and molasses coating.

Regarding claim 337, Feybusch teaches of support for a frozen comestible, such as, ice cream. The details of Figure 3 show a picture of ice cream on top of the cone. Feybusch also teaches that the ice confection is highly palatable in the edible support containing with molasses with popcorn or peanuts or rice (Page 1, lines 85-95).

Regarding claim 338, the edible support as taught by Feybusch comprises of distinct components, such as, pastry cone ingredients (composite materials), molasses, popcorn, peanuts or puffed rice or nut brittle (composite material) and thus comprises of composite materials. Thus the support for a frozen comestible as taught by Feybusch, comprises edible composite material as instantly claimed.

Regarding claim 339, The edible cone as taught by Feybusch is a support for the iced confection, which comprises, pastry cone, molasses, popcorn or nuts or puffed rice or

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brittle (Figures 1-3 and page 1), which are all ingredients that make up the support for a frozen comestible. Further, the edible cone as taught by Feybusch is a support for the iced confection, which can also be held in hand, i.e., a handle (Figures 1-3 and page 1) as instantly claimed.

Regarding claim 340, Feybusch teaches of the composite material of the edible support made up of two ingredient materials, such as, pastry cone which is a cookie or pasty or cracker. Feybusch also teaches of molasses which is an edible binder and /or a moisture resistant material. In addition Feybusch teaches of popcorn or puffed rice which is also known as crisped rice which form an edible coating. Feybusch further teaches of nut brittle which is a composite candy or confection. Thus the materials as taught by Feybusch (page 1, lines 20-30 and 55 to 105) fall in the instantly claimed choices.

Regarding claim 341, Feybusch teaches plurality of ingredients, such as, molasses which is an edible binder and/or moisture barrier. The edible support also comprises of puffed or crisped rice, popped corn (cereal), or peanuts (nuts) or nut brittle (composite bits) (page 1). Further, Feybusch teaches of coating the pastry cone with molasses (Page 1, lines 57-65). Feybusch also teaches that molasses forms a practically waterproof intermediate envelope, i.e., molasses forms a moisture resistant barrier (Page 1, lines 75-80), as instantly claimed.

Regarding claim 342, Feybusch teaches of support for a frozen comestible, such as, ice cream. The details of Figure 3 show a picture of ice cream on top of the cone. Feybusch also teaches that the ice confection is highly palatable in the edible support containing with molasses with popcorn or peanuts or rice (Page 1, lines 85-95).

Regarding claim 343 the applicant has chosen to claim an edible support (a product) and a means of making that support (apparatus or equipment) in one claim. One can

claim one invention at a time and support and means for making the support are considered as two separate inventions.

Note: Regarding the means for making a support as recited in claims **343** applicant is referred to the rejection under 35 USC 112 above.

Regarding claim 343, the edible support or cone taught by Feybusch comprises of two ingredient materials, i.e., cone making pastry material (such as sugar , flour etc) and edible adhesive material, such as, molasses (Page 1, lines 55-63), and popcorn or nuts or brittle or puffed rice (Page 1, lines 20-30) as recited in claim 343.

Regarding claim 344, Feybusch teaches of support for a frozen comestible, such as, ice cream. The details of Figure 3 show a picture of ice cream on top of the cone. Feybusch also teaches that the ice confection is highly palatable in the edible support containing with molasses with popcorn or peanuts or rice (Page 1, lines 85-95).

Thus the invention as recited in claims 319-344 is anticipated by Feybusch.

2) Claims 319-344 are rejected under 35 U.S.C. 102(b) as being anticipated by Musher (US 2217700).

The references and rejection are incorporated herein and as cited in the previous office actions.

Musher teaches ice cream (frozen comestible) on an edible support structure or a composite support which has at least two edible discernable (i.e. perceptible) edible materials or components or members that are combined together to make the support, i.e., two combined ingredient materials (Page 1: Column 1, lines 37-46 and Column 2 lines 40-55) also (Page 4: column 1, line 72 to Column 2, line 23), as recited in claims 319, 332, 338 and 343.

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The support as taught by Musher (figures 1-6) comprise of various edible ingredients, for example, cereal flakes, sugar, candy flakes or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47) that are combined to form the support, thus edible ingredient materials comprise an ingredient which forms a support, as recited in claims 320, 321 and 327. Further since a plurality of ingredients are combined in the support as taught by Musher, the support comprises of composite ingredient materials and various combinations of ingredients that form the support, as recited in claims 328, 329, 334, 335, 336, 338, 340, 341.

The support for a frozen confection as taught by Musher is made to be held in hand , (see figures 1-6), and may be made of stick, which can be either entirely edible or part inedible, which acts as a handle or support, as recited in claims 323, 325, 333, 339.

The edible/inedible stick as taught by Musher is attached to the cereal flakes, sugar, candy flakes or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47). The end of the stick may include a lollipop that is also connected structure pieces (Page 5: column 1, lines 26-33 and 54-65), which may include items such as nuts or even a plurality of candy pieces (page 3: Column 2, lines 14-21 and Page 5: Column 2, lines 24-35), and the lollipop (claim 331) and structure pieces i.e., before forming into a three dimensional composite support (Page 4: column 1, line 72 to Column 2, line 23) may be coated in hard fat (fluid ingredient), which prevents the transfer of moisture and improve the adhesion or grip of the frozen comestible (Page 3: Column 2 lines Page 5: Column 1 , lines 65 to Column 2, line 2), as recited in claims 326, 329, 331. Musher also teaches of a support for a frozen comestible, which comprises of two edible ingredient materials, which include a homogenous material such as candy, a composite material with one or more ingredients, for supporting the frozen comestible, as recited in claims 322, 324 . The ingredients as taught by Musher comprise a support wherein one portion of the support extends into the ice cream and the other portion extends out of the ice cream for holding the frozen confection vertically

i.e., the support forms a handle for an individual to hold a frozen comestible with (See figures 1-6 and Page 2: Column 2, lines 20-25; Page 3: Column 1 line 70-Column 2 line 5). Also see Page 6: Column 1, lines 4-70; Page 2, Column 2, line 4 to Page 3, Column 1, line 60) a handle as recited in 333, 339 and 324.

The composite support as taught by Musher has plurality of individual ingredients, which are the ingredient materials that form the support/handle. The ingredient materials can be discernible (i.e. perceptible), such as the cereal flakes, candy flakes, ribbons, grains etc., (Page 1: Column 1, lines 37-46 and Column 2 lines 40-55) also (Page 4: column 1, line 72 to Column 2, line 23). Musher further teaches the support structure for the frozen confection which includes an edible stick or lollipop, and a framework of other ingredients around it, where the composite support made by attaching the stick to the cereal flakes, sugar, candy flakes or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47), as instantly claimed. The stick part of the composite support as taught by Musher can be completely edible or part edible and part inedible (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47). Musher further teaches that the structure pieces around the lollipop, which include candy, can be placed concentrically (i.e. a circle around the lollipop) or maneuvered in some other manner on the support to improve the strength of the support, (page 5: Column 1, lines 45-54 and Column 2, lines 24-35), i.e., Musher teaches of support for frozen comestible having means for inhibiting the breakage. Musher also teaches that the finished product or the composite formed support can be coated with chocolate or sprinkled with other flavoring material, i.e., enrobed or dipped ingredient which is fluid (Page 3: Column 2, lines 25-30) to form a moisture resistant barrier as instantly claimed.

Regarding the means for making the support phraseology as claimed in 343, applicant is referred to rejection under 35 USC 112. Further it is noted that an edible support as recited in claims 319-344 is a different invention than the means or apparatus or

equipment that is used to make the support, therefore, claims 343 will only be examined to the extent to which they describe the product. Since Musher teaches of a support comprising two ingredient materials and also composite material, thus claim 343 is anticipated by Musher.

Regarding claims 330, 337, 342, and 344, Musher teaches of the ice confection with the support in it in the figures as instantly claimed.

Thus the invention as recited in claims 319-344 are anticipated by Musher.

Response to Arguments

Applicant's submission of January 28, 2008, cancelling all the claims examined in the final office action and adding all new claims 319-348 has been considered. All the remarks filed January 28, 2008 are addressed to the new claims and thus are moot in view of the new grounds of rejection.

I) Regarding the support for the terms rejected under 35 U.S.C. 112, applicant has presented no comments and although the applicant has removed the rejected claims, the newly added claims continue to be unclear for the reasons of record. For expediting the prosecution in future, the applicant is requested to provide support in the original disclosure of the present application for future reference.

II) Applicant's remarks regarding Musher have been fully considered but have not been found persuasive.

a) Regarding Musher not teaching a two ingredient support (Remarks, page 7), applicant is referred to the claim as recited "support....comprising two edible ingredient materials", the term comprising is open ended and does not convey that the support have only two edible ingredient materials. Further since the applicant has failed to show how the two ingredient materials are different from an ingredient in the support as stated in claim 320, therefore it is unclear as to what constitutes an ingredient or an ingredient material as recited. Also see the rejection of claims under 35 USC 112 above. Further, it

is noted that the applicant also states "Musher's composite support structure is made up of plurality of edible ...components" (Remarks, page 8, paragraph 3) and "each of the framework structures are bonded together to make the framework structure" (Remarks, page 9, paragraph following Example V). Thus the applicant admits that plurality of components come together to make the support structure as taught by Musher.

b) Regarding applicant's argument that "Musher's composite support structure is made up of plurality of edible ...components" (Remarks, page 8, paragraph 3 and page 10) and "framework structure comprises one material... and not two ingredient materials" (Remarks, page 9, paragraph following Example V). Further the applicant alleges that components, such as, baked dough constitute a single material and do not qualify as a two ingredient material. In response the applicant is reminded that a material, such as, baked dough, also comprises of ingredients including flour, water, salt or sugar or fats or oils and other flavors or additives, thus applicant's argument that none of the components in Musher's support structure are two ingredient materials is unsubstantiated and not persuasive.

c) Regarding applicant's argument that Musher's composite support structure is made up of components and not materials (Remarks, pages 8-10) a component is a constituent part; element; ingredient and a material is the substance or substances of which a thing is made or composed. Thus by definition all components are constituent parts or materials with which a thing is made, in the instant case a support for a frozen confection. Thus applicant's argument is not persuasive.

d) Regarding the argument that Musher's support is not non-frozen the applicant is reminded that the baked support and the flakes and nuts etc., as taught by Musher make the composite support structure, which comprises voids where the ice-cream mixture is poured and frozen. Applicant is further referred to page 4 of Musher, where Musher teaches molding of stick and other flake material into a support structure for the frozen confection and forming the structure and coating it. The formed and coated

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support structure of Musher is non-frozen prior to addition of liquid and freezing steps. Thus the composite support for a frozen confection as taught by Musher is not-frozen until the ice cream material is poured into the voids and the entire structure is frozen

III) Applicant's arguments regarding the claimed invention

a) Regarding the argument that "Musher's does not put voids in a support having two ingredient materials" (remarks, page 9) In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e. voids) are not recited in the rejected claim(s).

b) Regarding the argument that "applicant's two ingredient materials need not be attached to each other", page 11, has been considered, however, it is noted that the features upon which applicant relies (i.e. "two ingredient materials need not be attached to each other") are not recited in the rejected claim(s).

c) Regarding the argument that "Musher's support must be crisp", page 12, has been considered, however, it is noted that the features upon which applicant relies (i.e. "Musher's support must be crisp") are not relevant to the instantly claimed invention as it is not a limitation that is required as recited in the rejected claim(s).

d) Regarding applicant's argument that "applicant's support provides surface area to first and second portions of a support" (Remarks, pages 9-12) it is noted that the features upon which applicant relies (i.e., applicant's support provides surface area to first and second portions of a support) are not recited in the rejected claim(s).

e) Regarding applicant's argument that the "edible coating is placed between the two ingredient materials" (Pages 13-14) it is noted that currently rejected claims also do not recite the above statement.

Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Further the applicant is also referred to the description and figures in Musher where it clearly shows a three dimensional support which has surface area, absent any convincing evidence to the contrary.

IV) Applicant's remarks about the 35 USC 103 (a) rejections are moot, since the rejections have been withdrawn.

V) Applicant's claim for new and unexpected results has been considered however applicant's remarks on pages 13 and 14 have materials and ingredients that have not been claimed. Further the remarks offer no new data or experimentation that provides any evidence of the unexpected results.

Thus applicant's remarks have been fully considered but have not been found persuasive and claims 319-344 have been rejected for reasons of record.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action. Any inquiry concerning this communication or earlier communications from the examiner should be directed to

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JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 9:00 am to 5:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Jyoti Chawla
Examiner
Art Unit 1794

/KEITH D. HENDRICKS/

Supervisory Patent Examiner, Art Unit 1794